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In the

Supreme Court of the United States

October Term, 1962

No. 217

JOSEPHINE GOSS, ET AL.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

By consent of the petitioners and the respondents endorsed hereon, The Board of Education of Chattanooga, Tennessee, files this brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae*, Chattanooga Board of Education, has an interest in this case in that said Board has now pending in the Court of Appeals for the Sixth Circuit a petition for review of a decision of the United States District Court for the Eastern District of Tennessee, Southern

Division, *Mapp v. Board of Education of City of Chattanooga, Tennessee*, 203 F. Supp. 843, 853 in which the question involved is the same as that presented for decision in the instant case, that is where the state, acting through a local board of education, extends to parents of certain children in public schools the choice of enrolling their children in either of two schools, such parental choice to be exercised without any restrictions being imposed by the state other than mere transmittal of the decision, once made, to the school board, is such creation of the right of choice by the school board state action that denies equal protection under the Fourteenth Amendment since the result of such choice provision may be that Negroes will choose not to enter certain schools (formerly all-white) and, therefore, such schools may remain segregated, or desegregated to a lesser degree, and further that white parents may make an identical decision so that certain schools (formerly all-Negro) may remain segregated or desegregated to a lesser degree, such result being directly the result, and only the result, of the exercise of individual choice.

SUMMARY OF ARGUMENT

The action of the state in creating a right of transfer for certain pupils and/or their parents who find themselves in certain circumstances during a period while a public school system is in the process of compliance with the constitutional principles originally enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), does not violate the Fourteenth Amendment to the Constitution of the United States as such state action is in no way compulsory under any circumstances, and therefore cannot compel continued racial segregation in

a public school system in any form or degree. Such state action, in and of itself, does not deny equal protection to any individual. The action of the state in creating the transfer classification is grounded upon a reasonable justification, and represents the reasonable exercise of discretion in good faith and in light of all the circumstances by a school board as it progresses toward ultimate compliance with *The Brown Decisions*.

ARGUMENT

The question before the Court is the constitutionality of a transfer provision contained within a plan of desegregation which permits a pupil, who is zoned to a school with a student body composed of a majority of the opposite race, to transfer upon request to another school.

It is the contention of *amicus curiae*, Chattanooga Board of Education, that such transfer provision is not state action of a compulsory nature since it becomes operative solely upon the decision of individual white or Negro parents; therefore, the Fourteenth Amendment is not involved and *Brown v. Board of Education, supra*, is not involved as such was grounded entirely upon the Fourteenth Amendment. Compulsory state action is a necessary factor in order for the provisions of the Fourteenth Amendment to be applicable.

Since 1954 southern school boards have been attempting to discover a means of complying with the constitutional principle enunciated in *The Brown Decisions, supra*, and to maintain, at the same time, the quality of public education in their communities. Numerous lawyers, judges and others have been called upon to interpret *The Brown Decisions, supra*, as they relate to specific factual situations. Widely varying interpretations have resulted in many court decisions including dissenting opinions by respected

jurists. It is necessary to re-examine with meticulous care both the precise language of the Fourteenth Amendment and that of *The Brown Decisions*.

The plaintiffs from Kansas, South Carolina, Delaware, and Virginia based their complaints upon action of the various states resulting in compulsory public school segregation based upon race wherein admission of Negro pupils to certain schools was denied by the state (acting through school boards) solely because of the race of the Negro children. State action was present. Such action was of a compulsory nature. Individual action, discrimination by individuals, was in no way a part of the salient factors under consideration.

As state action was clearly present, the Fourteenth Amendment was applicable. Since the states denied Negro pupil admission to certain schools, the Fourteenth Amendment's specific language was involved. There can be no argument on these two precise points.

These plaintiffs alleged that racially segregated schools were not equal, and could not be made equal and hence that they were being deprived of the equal protection of the laws, again a clear, simple reference to the specific language of the Fourteenth Amendment.

This Court found as a fact that separate schools were not equal, were "inherently unequal", and that compulsory segregation based upon race alone by the action of an arm of the states was unconstitutional as violative of the Fourteenth Amendment.

These decisions were grounded unequivocally upon state action requiring racial segregation in public schools.

In the nationwide debate and conflict that has followed, certain key words have been utilized with repetition such as integration, segregation, resegregation and discrimination. Such words have been used too often in a loose and imprecise manner without the necessary qualifying words,

phrases and clauses. In the minds of many "discrimination" has acquired an automatic inference of unconstitutionality, when, upon reflection, it becomes obvious that the act of discrimination *by individuals* is a part of everyday life and a basic ingredient in individual freedom and liberty. The United States Constitution forbids unequal treatment by the states through laws denying rights. Individuals cannot dignify their individual desires to discriminate, for any reason, by reflecting their desires in the laws of the respective states. Restraints upon individual acts or attitudes of discrimination, whether for good or bad reasons, are beyond the practical power of the state.

In each instance, wherein the word "discrimination" has been introduced into the opinions of this Court, a particular category of discrimination has been described or clearly implied:

> " . . . all state-imposed discrimination against the Negro race. . . ." 347 U.S. 483, 490;
>
> " . . . elimination of racial discrimination in the public school system. . . ." 358 U.S. 1, 7;
>
> " . . . constitutional rights of children not to be discriminated against in school admission. . . ." 358 U.S. 1, 17.

In each instance whenever the word "discrimination" is used, for precise reading the qualification of compulsory state action resulting in discrimination must be added.

Individual discrimination is not prohibited by the Constitution of the United States. In fact, such is protected and defended by the Constitution.

The word "segregation" has been used in an imprecise manner and such use has added to the confusion, misunderstanding and resulting conflict and tension. Some would have this Court believe that segregation of any and all categories is unconstitutional as a result of the inter

pretation of the Fourteenth Amendment in *The Brown Decisions*. The reasoning applied to "discrimination" above is equally applicable to the word "segregation." Many groups, religious and otherwise, voluntarily segregate themselves in at least a portion of their daily living. Such is a part of their freedom and liberty. Such is in no way violative of the Fourteenth Amendment.

Whenever the word "segregation" appears in *The Brown Decision, supra*, or *Aaron* v. *Cooper*, 358 U.S. 1, the facts complained of when the suits were originated must be implied — segregation compelled by state action based upon race alone.

Segregation, per se, is not unconstitutional.

Petitioners complain that the transfer provisions under consideration will result in racially segregated schools. *Amicus curiae*, Chattanooga Board of Education admits such is a reasonable probability, but maintains that such segregation results from decisions of individuals and not from compulsory state action since the transfer provisions are operative only upon individual decisions made without interference by the state in any manner.

There are only four possible factual situations created by such transfer provisions in the Chattanooga public schools, and elsewhere, with reference to enrollment in individual schools:

A. Formerly all-white school wherein the single zone system places a minority of Negroes in the formerly all-white school.

B. Formerly all-Negro school wherein the single zone system places a minority of white children in the formerly all-Negro school.

C. An all-Negro school because no white children live in the school zone, and

D. An all-white school because no Negro children live in the zone.

In situation A. Negro parents did not exercise the right of transfer except for eighteen out of sixty-nine children. As a result, five schools were desegregated. In situation B all white parents requested a transfer so that none of such Negro schools were desegregated. Parents have many reasons for applying for transfers, *one* of which may be race. However, other reasons may be decisive. The granting of transfer requests may decrease the number of schools and classrooms that will be desegregated. Yet this would not have occurred ~~*but for*~~ the exercise of individual judgment by parents. Such continued segregation cannot result from compulsion by the state.

After careful analysis it is clear that the transfer provisions in question cannot function in any manner so as to compel continued segregation in public schools nor to compel a lessening in the degree of desegregation — as a necessary result of state action.

It is true that such transfer provision will create the *opportunity* for continued segregation and lessening of desegregation. But for either or both results to occur, there is the necessary ingredient of the exercise of freedom of choice by both Negro and white parents. Is it unconstitutional for a state to create such an opportunity for individual freedom of choice? Does the Fourteenth Amendment say to each State that it cannot act or refuse to act in any manner that *might* create circumstances wherein individuals *could* act or refuse to act so that segregation somewhere, sometime and in some form is merely *allowed to continue to exist?* Is it now the obligation of the state to move into every situation where any form of segregation may exist and take affirmative action to eliminate segregation? Is this the essence of *The Brown Decisions?*

To adopt this concept is to disregard causation as pointed out by Circuit Judge Miller in his dissenting opinion in *Taylor v. Board of Education of New Rochelle*, 294 F. 2d 36, p. 46

> "The concept of causation pervaded the law long before the adoption of the Fourteenth Amendment or even the United States Constitution. In order to obtain relief from an injury which allegedly results from unconstitutional State action, it is necessary to show both that the State has acted unconstitutionally and that this action caused the injury of which the plaintiff complains."

And even if such causation is present, still another factor must be examined and found to be present before ultimate condemnation of the state action in question.

> "Finally, the opinion must be viewed in the light of the entrenched rule of law that only 'State action of a particular character is . . . prohibited by the Fourteenth Amendment' (e.g., *Civil Rights Cases*, 109 U. S. 3, 11 (1883)); that the 'Amendment erects no shield against merely private conduct, however, discriminatory or wrongful' (*Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)); and that thus if State action did not purposefully create the present racial imbalance at Lincoln, the Constitution would not place an affirmative duty on the Board to desegregate. 'The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration . . .' (*Borders* v. *Rippy*, 5 Cir., 1957, 247 F. 2d 268, 271). 'The Constitution in other words does not require integration. It merely forbids discrimination. . . .' (*Briggs* v. *Elliott*, E.D.S.C., 1955, 132 F. Supp. 776, 777)". *Taylor* v. *Board of Education of New Rochelle*, *supra*, at p. 47.

The transfer provisions in question create two classifications, and these classifications are state created. Are such classifications unreasonable even though they may be technically discriminatory? First should be considered what is the nature of the classification.

A. A public school system in process of shifting from a racially segregated program to one wherein admission to any school is not conditioned upon race alone. That such is a transitional period is obvious from the use of such phrases as "school previously serving white students only . . . ."

B. The transfer right is extended only to pupils and/or parents who are of the minority race in the school to which such pupil is zoned on a geographical basis.

C. With the exception of entering first graders, for such pupils within the classification, this requires a shift from the school formerly attended prior to initiation of desegregation — a radical change in environment, school allegiance, teachers, playmates, etc.

Such classification was created for a purpose and with reasons — reasons believed by many school board members to be reasonable and sound, yes, even essential to peaceful, effective compliance *and* the maintenance of the quality of public education. Excerpts from the dissenting opinion of Circuit Judge Haynsworth in *Dillard* v *The School Board of the City of Charlottesville*, 308 F. 2d 920, p. 928, 929 summarize this reasoning:

> "Those conversant with the problems of desegregation in the South, know the intensity of public concern over the plight of children constituting a small majority *unwillingly assigned to a school in which an overwhelming majority is of the other race.* "If separation of Negro children 'solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,'[4] such a child may be subjected to a much more searing experience if,

[4] *Brown* v *Board of Education*, 347 U S. 483, 495, 74 S Ct. 686, 98 L. Ed 873

bereft of established friends and relations, compelled to attend a school or classes in which all others are of the opposite race. Some children could adjust themselves to such a situation, but in the early stages of desegregation when the force of old customs and practices is unspent, many could not. Those who could not adjust to such a radical change would likely have senses of inferiority greatly intensified, and unadjusted children too frequently become the butt at the hands of their fellows of those unrestrained cruelties of which children of all races are capable. If such unadjusted children are compelled to remain in an intolerable situation, the damage to their emotional and mental development and well-being will be irreparable.

"It is because of such widespread concern over the plight of *unwilling minorities* in particular schools that school boards throughout the South have adopted permissive transfer provisions in association with assignment plans based upon attendance areas or other objective criteria. In some places, such a provision may be essential to the institution or continuance of a plan of desegregation, for it touches an area of peculiar public sensitivity, *and school boards cannot operate public school systems without public support.*

"Provisions for permissive minority transfers are founded upon an assumption that the transition to a fully desegregated school system will create personal problems for unwilling minorities in particular schools, especially when the minority is relatively small, which differ in kind and degree from the problems which majorities, especially relatively large majorities, may be expected to encounter. The assumption seems plainly valid, for it hardly is to be doubted that a child well adjusted in school A where his race predominates, where he has established friendships and where he ardently wishes to be, may become very maladjusted if compelled to attend school B where his own race is a small minority, where he has no

established friends and where racial differences may become greatly magnified in his own mind. Such a problem is obviously more acute and more difficult to overcome than any personal problem which may be anticipated by members of racial majorities, unseparated from established friends, compelled to accommodate themselves to the presence or absence of a minority of pupils of the other race.

"Of course, the magnitude of the personal problems and of the difficulties in the way of requisite adjustments will vary with individuals and with differences in environmental conditions. A child who might encounter insurmountable difficulty, as a member of a small minority, in making the personal adjustment, might encounter little difficulty if the minority group was relatively large, 49%, for instance,[5] and included others who were his old friends. Such variances, however, do not militate against the general validity of the assumption that, in the transitional period, unwilling members of minority groups will encounter difficulties and problems which are different in kind and degree from those which members of majority groups may be expected to encounter.

"This kind of problem exists whatever the race of the minority group. That present provision for permissive minority transfers is in the interest of Negro minorities is suggested by the extent to which they avail themselves of it. This very record discloses that fifty Negro pupils availed themselves of the permissive right to transfer to Jefferson School, rather than attend the predominantly white schools in the attendance areas of which they resided."

To further comprehend the practical results of a rigid geographical zoning without minority transfers, it is necessary for school boards to project their joint thinking to a situation that has not yet occurred in the desegregation

[5] Of course, that is not this case.

process, but will result if the plaintiffs are successful before this Court in striking down minority transfers. What can a board do if a white child or a Negro child refuses to attend a school where such child is in a minority? A board in Tennessee can invoke the compulsory attendance law and turn the matter over to the state courts. Contempt measures would be available. But what if the parent does not purge himself of the contempt charge? How would a contempt ruling be enforced against a child? Would an officer of the Court escort such child to school each day against his or her will and then remain on duty to make certain that the child was restrained in the classroom? Practical considerations involved in enforcement of judicial actions must be considered carefully.

There can be no argument about the absence of compulsory state action in the transfer provisions before the Court. As a factual matter such action does not and cannot exist. Therefore, if compulsory state action is essential to the applicability of the Fourteenth Amendment, then such amendment is irrelevant to the question before the Court. The only way to involve the Fourteenth Amendment is to hold as a matter of constitutional interpretation that such amendment does cover such state action that does not compel. Such a decision forces the states and the courts into vast areas of speculation, probability and confusion — not only with regard to racial discrimination in the public schools, but across all human endeavor and activity.

Amicus curiae contends that the Fourteenth Amendment is applicable only if state action is required and the compulsory nature of such action is disregarded. Causation must be dismissed as irrelevant. Such an interpretation would appear to be unsupported by either logic or reason.

Should these two objections be met, the classifications created by state action must be found as a fact to be unreasonable.

Amicus curiae, Chattanooga Board of Education respectfully requests approval of the transfer provisions in question because:

A. the state action involved, considered alone, does not cause nor compel continued public school racial segregation, does not deny equal protection, and therefore does not violate the Fourteenth Amendment.

B. such state action in any event is a classification based upon reasonable grounds and is therefore not violative of the Fourteenth Amendment.

C. even if such state action is objectionable, it is a reasonable exercise of discretion by a school board, consistent with the second *Brown Decision* during a transition period as such represents reasonable progress toward ultimate compliance.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments of the Court below should be affirmed.

Respectfully submitted,

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